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Administrative Law Pragmatism

Ronald M. Levin*

When I learned that I would be installed as the William R. Orthwein Distinguished Professor of Law, I realized that I would need to prepare an installation speech that would befit the occasion. I decided that I should emulate past chair recipients who have used their installation addresses to expound the unifying themes and core theoretical commitments that underlie their teaching and scholarship. As I began planning out my own speech, however, I began to feel that this wasn't going to be easy. After all, I've been teaching and writing about administrative law for many years. And, unfortunately, administrative law does not have a strong reputation for liveliness.

The challenge might be summed up in a story that I have seen attributed to Justice Stephen Breyer, who was a longtime professor of administrative law at Harvard. Supposedly, he once picked up his student course evaluations, and one student wrote: "If I had one hour to live, I would like to spend it in Professor Breyer's class." He thought that was pretty nice, and then he turned the page and found that the student continued, "because an hour in Breyer's class feels like an eternity."

Administrative law is also a somewhat elusive subject, and students aren't always sure what they're getting. Two or three generations earlier at Harvard, another future Supreme Court Justice and administrative law authority, Professor Felix Frankfurter, taught a course that he called Public Utilities. According to the folklore, one of *his* students summed up the course in verse:

* William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis. This is a slightly edited version of an address I gave at my installation ceremony on April 1, 2011. The speech was written for a lay audience, and I have not attempted to convert that relatively simple presentation into a fully documented and rigorously argued law review article. However, I have added a few annotations and amplifications in the footnotes for those readers who might be interested in further exploration of its ideas.

You learn no law in Public U

That is its fascination.

But Felix gives a point of view

And pleasant conversation.

Now that's what I call setting the bar low! Ironically, though, the author of that rhyme later became a Frankfurter protégé and a specialist in public utilities regulation.¹ So perhaps we professors don't always understand what we are accomplishing while it is under way. At least, that's the optimistic interpretation.

My biggest worry about trying to expound my scholarly philosophy was that, at first, I was not at all sure that I have one. However, as I began looking back at and reflecting on my past articles, I noticed that quite a few of them advocated what I called a pragmatic approach to their subjects² or praised some prominent legal authority for his pragmatism.³ So I thought, okay, apparently I do have a scholarly philosophy after all (almost like the character in the Molière play who was pleased to find out that he had been speaking *prose* all his life without knowing it).⁴ With that thought in mind, I decided that I would spend some time today explaining what I mean

1. See JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 15 (1975) (ascribing the verse to Francis Plimpton); JEFFREY BRANDON MORRIS, "MAKING SURE WE ARE TRUE TO OUR FOUNDERS": THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1970-95, at 20 (1997) (noting that "[a]s a result of a recommendation by Felix Frankfurter made to Walter Lippman, Plimpton wrote editorials for the *New York World* while he was in law school" and that at the Debevoise law firm he "was involved in the legal problems of railroad and public utilities reorganizations").

2. See Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2235-39 (2011); Ronald M. Levin, "Vacation" at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 345-48 (2003) [hereinafter Levin, *Vacation at Sea*]; Ronald M. Levin, *Judicial Review of Procedural Compliance*, 48 ADMIN. L. REV. 359, 360 (1996); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 740-42, 779-81 (1990) [hereinafter Levin, *Unreviewability*].

3. See Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 343-45 (2005); Ronald M. Levin, *A Master Craftsman Leaves the Bench*, ST. LOUIS POST-DISPATCH, July 25, 1990, at 3B (commending Justice Brennan's "measured and pragmatic" style).

4. MOLIÈRE, *LE BOURGEOIS GENTILHOMME*, act II, sc. 4, l. 34 (1670).

by this notion of pragmatism in the context of administrative law and how it has played out in my writing.

The word “pragmatism” can have a variety of meanings, ranging from formal philosophy to popular usage. In the field of law, pragmatism commonly means a perspective that evaluates policies by looking at how they work out in practice.⁵ The test of a good policy, according to this view, is that it leads to beneficial real-world outcomes. It can be helpful to contrast pragmatism with formalism and various ideologically driven approaches: the pragmatist tends to mistrust positions that people take “on principle” if those advocates do not take account of how their positions work out in practice.

Justice Breyer describes himself as a pragmatist.⁶ Here is an apt quote from his recent book, *Making Our Democracy Work* (and it’s only a few sentences, so it shouldn’t feel like an eternity):

Judges should use traditional legal tools, such as text, history, tradition, precedent, and purposes and related consequences, to help find proper legal answers. But courts should emphasize certain of these tools, particularly purposes and consequences

I do not argue that judges should decide all legal cases pragmatically. Rather, I suggest that by understanding that its actions have real-world consequences and taking those consequences into account, the Court can help make the law work more effectively. . . .⁷

The quote speaks to the role of the judge, but I mean to extrapolate it to the world of scholarship and pursue the same basic idea today.

As Justice Breyer indicates, we are not talking here about a simon-pure focus on only one variable. I assume that the usual norms of legal craftsmanship apply. So the point is that, within the

5. For general discussions, developed with far more depth and nuance than is possible here, see, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 11–15, 345–405 (1995); Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 *AM. J. JURIS.* 315, 329–37 (1996).

6. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* xiii–xiv, 80–87 (2010).

7. *Id.* at 74.

boundaries set by those norms, special attention should be given to the way in which policies or doctrines work out in actual operation.

An example of this type of analysis in my work is the article that I wrote called “‘Vacation’ at Sea,”⁸ which of course had nothing to do with ocean voyages. It was about the confusion surrounding the courts’ practice of *vacating* administrative rules that they find to be illegal. In other words, when a court sends a rule back to an agency for further consideration, does it have to throw out the rule, or does it have the option of letting the rule remain in effect while the agency is responding to the court’s objections?

There is a perfectly decent argument made by some judges⁹ that the latter practice—letting the rule remain in effect—is flatly illegal. They point out that the Administrative Procedure Act, if you read it literally, says that a court “shall . . . set aside” an agency action that it finds to be unlawful.¹⁰ There is also a countervailing argument, which I made in the article, based on canons of statutory construction.¹¹ That is a respectable doctrinal argument. But the driving force behind the article’s analysis was that courts *need* the power to remand rules without vacating them, because it would sometimes be highly disruptive to suddenly eliminate a regulation that has already gone into effect and that people are depending on.¹² For example, the government should not adopt regulations on food stamps without seeking public comment first, and if it does, it should fix that situation; but you don’t want poor people to have to go without food stamps for a few months while that error is being repaired.¹³ And you also want the EPA to have rules in place to deal with serious safety hazards such as releases of radioactive material, even during a period in which the EPA is repairing a mistake in the way those rules were issued.¹⁴ These examples are drawn from real cases, and I argued that

8. Levin, *Vacation at Sea*, *supra* note 2.

9. *See Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009) (Randolph, J., concurring); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting).

10. 5 U.S.C. § 706(2) (2006).

11. Levin, *Vacation at Sea*, *supra* note 2, at 310–15.

12. *See id.* at 298–305.

13. *See Rodway v. USDA*, 514 F.2d 809, 817 (D.C. Cir. 1975).

14. *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

a court should at least have the option of responding to practical factors of this sort.

Now, you may be thinking that, even if this type of pragmatic reasoning is valid, there is nothing very distinctive about it. After all, most legal academics tend to make *some* practical arguments in support of their positions. This is a fair point. But I want to go a step further and outline a narrower, and definitely non-vacuous, concept that I will call *administrative law pragmatism*. By this I mean a belief in trying to accomplish social ends effectively through the use of the administrative process.¹⁵

Now we're talking about not only an analytical style, but also a matter of institutional choice. Administrative agencies have some advantages over other means by which society tries to solve its problems, but they also have some limitations. For example, they can be good in terms of deploying expertise and specialized experience, but not so good in terms of being vulnerable to rigidity or overly political impulses. So opinions about this institutional choice can differ, but the administrative law pragmatist emphasizes the positive side of the equation.

To illustrate this concept on a more concrete level, I'm going to do what law professors typically do: discuss a case. The case is *FDA v. Brown & Williamson Tobacco Corp.*¹⁶ In this case, which was decided a little over ten years ago, the Supreme Court struck down the FDA's rules that restricted the promotion and sale of tobacco products to minors. The Court held that the agency had no jurisdiction over tobacco.¹⁷ It was a 5-4 decision with a majority opinion by Justice O'Connor and a dissent by Justice Breyer. I'm

15. This mode of analysis is loosely adapted from philosophers' concept of pragmatism, but I do not pretend that it can be deduced in any rigorous fashion from that concept. It is not even the only theory that can lay legitimate claim to the banner of "administrative law pragmatism." Professor Shapiro has developed a similarly named theory in an essay that seems primarily devoted to analyzing, on pragmatic grounds, the doctrines of administrative law itself. See Sidney Shapiro, *Pragmatic Administrative Law*, in ISSUES IN LEGAL SCHOLARSHIP: THE REFORMATION OF ADMINISTRATIVE LAW (2005), <http://www.bepress.com/ils/iss6/art1>. The argument presented here has a similar aspiration, but it also seeks to apply concepts of pragmatism to evaluating the utility of regulation itself.

16. 529 U.S. 120 (2000).

17. *Id.* at 161.

going to support Justice Breyer's side. He would have upheld the regulations.

Two things about the majority's decision made it a bit surprising. The first was that the language of the provision under which the agency had acted *was* broad enough to apply to tobacco, or so the Court assumed for purposes of its decision.¹⁸ The second was that the Court agreed with the FDA that tobacco use is a public health problem of enormous dimensions, causing thousands of premature deaths every year.¹⁹ Nothing in the Court's opinion identified any specific practical problems with the regulations, such as being too expensive, ineffective, burdensome for tobacco farmers, etc.

So what was the problem? The majority had two main objections to the rule. First, Congress had passed a few related statutes that regulated tobacco, such as the law that requires Surgeon General's warnings on cigarette packages. The Court treated these statutes as evidence that Congress had long since decided that the FDA itself could not or should not have jurisdiction over tobacco.²⁰ I doubt the Court could have rested on this point alone, however. You could argue instead that Congress had reached no conclusion one way or the other about the FDA's authority over tobacco.²¹ After all, it could have directly told the FDA to stay out of this area, but it never did.

Justice O'Connor's second main reason for doubting the FDA's jurisdiction over tobacco—probably the key reason—was that the agency's mission is to ensure that the products that it does regulate are "safe" and "effective."²² But tobacco use is unsafe and can't be made safe. Therefore, the Court said, if the FDA were to take jurisdiction over tobacco products, it would have to ban them from the market entirely, a result that none of the parties and nobody on the Court was advocating.²³

18. *Id.* at 131–32 (assuming *arguendo* that nicotine is a "drug" and that tobacco products are drug delivery "devices," because they are "intended to affect the structure or any function of the body," as required by the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 321(g)(1)(C), 321(h) (2006)).

19. 529 U.S. at 125, 127–28, 161.

20. *Id.* at 143–59.

21. The dissent did rely on this argument. *Id.* at 181–83 (Breyer, J., dissenting).

22. 21 U.S.C. § 393(b)(2) (2006).

23. *Brown & Williamson*, 529 U.S. at 137.

The dissenters thought this interpretation of the Act was “perverse”²⁴—or, if you will, not up to snuff. Why would you want to say that the FDA has no jurisdiction over tobacco because it is *more* dangerous than the products that the agency does regulate? This defeats the fundamental purpose of having a Food and Drug Administration. Thus, the dissenters argued, the Court ought to find a way to read the Act flexibly enough to allow the FDA to regulate tobacco without banning it.²⁵

So now we have come to the crux of the issue. The majority was right to say that the Federal Food, Drug, and Cosmetic Act was not ideally designed to handle problems of tobacco regulation. But Justice Breyer’s dissent aptly captures the spirit of what I am calling administrative law pragmatism. If the language and history of the statute were inconclusive, the regulations would alleviate a serious social problem, and the majority was unprepared to identify any problems those regulations would cause, *why not* read the Act flexibly and avoid the anomaly of saying that the FDA can’t do anything about tobacco because it’s *too* dangerous?

In short, the Breyer and O’Connor opinions in *Brown & Williamson* seem to reflect fundamentally different premises about how to interpret regulatory legislation. One side is very receptive to administrative creativity to ameliorate pressing social problems, and the other side is more skeptical.

But now I want to add another dimension to my example of tobacco regulation. With the benefit of hindsight, we can see some of the other ways in which our legal system could have, and actually has, come to grips with the same public health challenge. In 2009 Congress finally gave the FDA explicit authority over tobacco products.²⁶ You could argue that this legislation retroactively justifies the Supreme Court’s ruling, because, by clearing away the FDA regulations back in 2000, the Court set the stage for a more democratically legitimate outcome from the popularly elected branch of government. But if you start with the premise that Congress is *by*

24. *Id.* at 174, 180–81 (Breyer, J., dissenting).

25. *Id.* at 179–81.

26. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

definition the right body to take the action, you are probably not an administrative law pragmatist.

The question I would ask is whether the rules authorized by the 2009 Act will actually turn out to be better than the FDA's, or perhaps whether the tobacco industry will comply more readily because they came from Congress. I don't know of any clear reason to think that the answer to those questions is yes.²⁷ So I am not so sure that it was better to wait an extra decade to get safeguards into place.

Meanwhile, we can also see that the tobacco industry has in the intervening years been hit with civil suits brought by state attorneys general and private plaintiffs, as well as a civil RICO suit brought by the Justice Department.²⁸ Were those superior methods of holding the industry accountable? A self-respecting pragmatist would not offer a firm opinion without a careful inquiry into how they respectively worked out.²⁹ However, an *administrative law pragmatist* might at least start with the hypothesis that the administrative solution had some built-in advantages that the others did not: an expert agency, political oversight, a system of deliberation that emphasizes broad participation, a duty imposed on the agency to respond to points raised by all sides, and judicial review of the agency's conclusions to help ensure their scientific validity. A judge or jury would not seem to have those structural advantages.³⁰

27. For a decidedly pessimistic assessment of the 2009 Act by one expert on food and drug law, see James T. O'Reilly, *FDA Regulation of Tobacco: Blessing or Curse for FDA Professionals?*, 64 FOOD & DRUG L.J. 459 (2009).

28. See generally Micah J. Berman, *Smoking Out the Impact of Tobacco-Related Decisions on Public Health Law*, 75 BROOKLYN L. REV. 1 (2009) (summarizing intervening developments).

29. Some scholars have raised serious doubts about the capacity of civil litigation to handle the public health challenges of tobacco use. See, e.g., Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED. 187, 198-99, 200-03 (2000); Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL., POL'Y & L. 769 (1999). More recently, the federal government's civil RICO action has gone to judgment, with substantial relief being awarded and upheld. *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C. Cir. 2009). However, the relief in this case excluded certain remedies, such as required counter-marketing and smoking cessation programs and disgorgement of past profits, because these remedies were found to be unauthorized by the RICO statute. *Id.* at 1147-50.

30. See generally Peter H. Schuck, *The New Ideology of Tort Law*, 92 PUB. INTEREST 93, 107-09 (Summer 1988) (contending that "even a brief comparison of the courts' policymaking

This last point about procedures and judicial review leads me to draw attention to an important qualification in the overall concept that I am laying before you. It may have sounded as though I am arguing in favor of giving administrative agencies as much power as possible, but that is not what I intended. Limitations on agency power through orderly procedures, political oversight, and judicial review are themselves part of the overall administrative law system. The administrative law pragmatist does not try to minimize these controls, but he asks that they should themselves be evaluated according to how well they work, as opposed to being simply taken for granted because they are traditional or because they fit an abstract model.

Another of my past law review articles is relevant to this point. This one was about defining which administrative actions should be exempt from judicial review.³¹ I did not argue that this category should be expanded as much as possible (or for that matter that it should be narrowed as much as possible). I did argue, however, that the Supreme Court's doctrines on this subject did not pay enough attention to practical factors such as the institutional abilities and limitations of the courts and the social importance of getting judicial input on various types of issues.³² For example, the courts usually have more to contribute regarding issues of law than regarding issues of fact.³³

So, from my point of view, regulatory systems—which include both generously defined powers for administrative agencies and checks on the exercise of those powers—have much to offer in our complex society.

I am not under any illusion, however, that I have articulated a model that everybody can be expected to get behind. We all know that many people in our society are deeply skeptical about administrative regulation as a tool for social problem-solving. Right now we're seeing that skepticism play out tangibly in the form of government-wide budget restraints that leave regulatory agencies

capacities with those of legislatures and agencies indicates the severe limitations on courts' competence to perform the kind of policymaking to which their new ideology of tort law commits them").

31. Levin, *Unreviewability*, *supra* note 2.

32. *Id.* at 740–42, 779–80.

33. *Id.* at 746–50.

without enough resources to carry out their assigned tasks. Our former dean, Joel Seligman, recently spoke here about how the SEC's ability to implement last year's financial reform bill is being impaired by inadequate funding for personnel to do the job.³⁴ The same situation prevails at numerous other agencies.³⁵

I don't expect the debate over the merits of administrative law pragmatism to be resolved any time soon, or even that we can foresee any broader consensus about it than exists right now. Instead, the lesson I would draw is that supporters of regulation as a mode of governance will need, for the indefinite future, to make their case for it to a mistrustful world. They will have to show, in particular contexts, that the administrative process can operate efficiently as well as fairly. There is plenty of room for further study and debate about these questions, and I look forward to exploring many of their dimensions myself in future years.

34. Joel Seligman, President, University of Rochester and former Dean, Washington University School of Law, Tyrrell Williams Lecture, *The Future of Financial Regulation*, (Mar. 3, 2011), in *Key Implications of the Dodd-Frank Act for Independent Regulatory Agencies*, 89 WASH. U. L. REV. (forthcoming 2011).

35. See RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC* 54–71 (2010); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61 (1997); *For Regulatory Agencies, Intrigue in an Otherwise Bleak Budget*, OMB WATCH, Feb. 12, 2010, available at <http://www.ombwatch.org/node/10762>.